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No. 99-120

In the Supreme Court of the United States

TUSCHNER & COMPANY, INC., AND JOHN M. TUSCHNER,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court had subject matter jurisdiction to enforce a bar order of the Securities and Exchange Commission prohibiting association with a particular broker-dealer, where the barred person, while residing in Greece, solicited Greek customers for a United States brokerage firm, opened accounts for them with that firm, and directed trading through that firm in securities of a United States company on United States markets.

2. Whether the district court committed clear error in finding that the person subject to the bar order was an "associated person" of petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 167 F.3d 396. The opinion of the district court (Pet. App. 8a to 27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1999. A petition for rehearing was denied on April 16, 1999 (Pet. App. 7a). The petition for a writ of certiorari was filed on July 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 27, 1993, the Securities and Exchange Commission (SEC or Commission) found that Nicholas Zahareas had committed fraud in violation of the federal securities laws. See generally *SEC* v. *Zahareas*, Civil Action No. 3-92-CV-431 (D. Minn. July 16, 1992). The Commission issued a consent order against him, barring him from association with any broker, dealer, municipal securities dealer, investment adviser, or investment company. Pet. App. 9a-10a.

In 1996 petitioner John Tuschner, the chairman and CEO of petitioner Tuschner & Co., a Minneapolis securities firm, was introduced to Zahareas, who was residing in Athens, Greece. Tuschner viewed Zahareas as a potential selected dealer for an offering of securities of ACT Teleconferencing, Inc., for which Tuschner & Co. was the managing underwriter. Tuschner abandoned that idea when he learned that Zahareas was subject to a Commission bar order. Instead, Tuschner & Co. began paying a fee to Zahareas's wife, purportedly for her solicitation of Greek customers for Tuschner & Co. Pursuant to that arrangement, Zahareas's wife referred at least 12 Greek customers to Tuschner & Co. during the first months of 1996. SEC C.A. Br. 6-7.[1]

After the ACT public offering closed, Zahareas established a firm called Euroamerican. Tuschner and Zahareas entered into an oral agreement under which Zahareas was ostensibly to act as a "foreign finder" for Tuschner & Co., "referring" customers to Tuschner &

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[1] A copy of the SEC's court of appeals brief has been lodged with the Clerk of this Court. It includes appropriate citations to the record to document the facts recited herein.

Co. and receiving up to 75% of the revenues generated from trades in the accounts he referred. As of July 31, 1997, Tuschner & Co. had approximately 200 Greek customers referred by Zahareas, and between March 1997 and July 1997 alone, those customers purchased or sold, on a United States market, at least $9,430,000 worth of securities in a United States company through Tuschner & Co. From those transactions Tuschner & Co. earned gross commissions of at least $213,554, of which at least $144,973 was paid to Zahareas through Euroamerican. SEC C.A. Br. 8-9.

The Greek investors Zahareas solicited became customers of Tuschner & Co. The firm supplied Zahareas with new account forms bearing the name of Tuschner & Co.'s clearing broker and including, among other things, an account agreement incorporating the laws of the State of Minnesota. Zahareas (or a Euroamerican associate) would complete the forms and send them to Tuschner & Co. for review. If Tuschner & Co. employees determined that additional information was needed to render account documentation complete and accurate, they would direct Zahareas to provide it. On at least one occasion, Tuschner & Co.'s compliance officer "remind[ed]" Zahareas of the requirement that account documentation be "reasonably complete and accurate and truthful, et cetera, et cetera." SEC C.A. Br. 9-10.

Tuschner & Co. then opened accounts for its Greek customers. The process for opening those accounts was virtually identical to that for opening any other Tuschner & Co. customer account. For example, the firm assigned its Greek customers account numbers and mailed them "welcome" or "thank you" letters signed by Tuschner – the same letter it sent all its customers. Together with the letter, Tuschner & Co. included

copies of the customers' account forms for verification. Trading in the Greek customers' accounts also occurred in the same fashion as in other accounts. Tuschner & Co.'s trader, John Penshorn, was responsible for executing customer orders in United States markets—including those of Tuschner & Co.'s Greek customers—on the instruction of Tuschner & Co. representatives. Initially, those instructions came through John Tuschner, but sometime in late 1996 or early 1997, Tuschner authorized Penshorn to execute trades in the Greek customers' accounts on Zahareas's instruction. SEC C.A. Br. 11.

Zahareas thereafter effected transactions in the same manner as did any Tuschner & Co. representative operating from a remote location. Zahareas would call Penshorn up to six times a day to instruct him about what securities (typically ACT securities) to buy or sell for Tuschner & Co.'s Greek customers. Penshorn filled out order tickets reflecting Zahareas's instructions and executed the trades. And those order tickets, like order tickets reflecting transactions in the accounts of domestic customers, were reviewed by the firm's compliance officer. Penshorn also generated confirmations of these trades, which were mailed to Tuschner & Co.'s Greek customers, as were monthly account statements bearing Tuschner & Co.'s logo. Once in a while, Tuschner & Co.'s back-office employees would enclose something else in the envelope, such as a form requiring a signature. Records relating to Tuschner & Co.'s Greek customers' accounts, including correspondence received directly from those customers, were maintained in the same fashion as those of Tuschner & Co.'s other customers. SEC C.A. Br. 11-12.

Tuschner & Co. assigned to Euroamerican an "account executive" or representative number that was

reflected on the confirmations and monthly statements mailed to Greek customers. In addition, Zahareas regularly requested and received from Penshorn, Tuschner, and others at the firm internal reports regarding the Greek customers' accounts, such as "Money Line"—a report Tuschner & Co. representatives used to monitor cash balances in their customers' accounts. Zahareas was compensated for trades in Tuschner & Co.'s Greek customers' accounts in the same fashion as any Tuschner & Co. representative because the trades in those accounts were "regular business." At the end of each month, Zahareas's compensation was recorded in the same manner as was the compensation due any Tuschner & Co. representative. Moreover, when Tuschner & Co.'s trading department lost money on a transaction Zahareas requested, Zahareas, like any Tuschner & Co. representative, was charged for that loss in the form of a deduction from his compensation. SEC C.A. Br. 12-13.

After the Commission began its investigation, Tuschner & Co. stopped paying commissions to Zahareas on the Greek customers' trades. Tuschner sent Zahareas a letter on September 3, 1997, stating that Tuschner & Co. and Euroamerican should cease doing business pending completion of the Commission's investigation and should transfer the accounts to a different Greek broker-dealer or investment adviser. According to Tuschner, Zahareas had "no choice" about whether his relationships with the Greek customers would be severed. SEC C.A. Br. 13-14.

2. a. The Commission filed its complaint in December 1997, alleging that Zahareas had associated with Tuschner & Co., in violation of the 1993 Commission bar order and Section 15(b)(6)(B)(i) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C.

78*o*(b)(6)(B)(i); that Tuschner & Co. had allowed him to become so associated, in violation of Section 15(b)(6)(B)(ii) of the Act; and that Zahareas and Tuschner had aided and abetted those violations. The Commission sought an order compelling Zahareas to comply with the bar order, and it further sought injunctive relief, disgorgement, and a civil money penalty. SEC C.A. Br. 14-15.

On January 28, 1998, the district court denied the defendants' motions to dismiss and granted the Commission's motion for a preliminary injunction. Pet. App. 9a. The district court first held that it had subject matter jurisdiction, reasoning that "sufficient activity of the defendants alleged by the Commission to be in violation of the Exchange Act and prior Commission bar order occurred in this country." *Id.* at 15a. The court noted that the defendants had corresponded frequently and had met at least once in this country. *Ibid.* "Further," it observed, "the Greek customer accounts are located in Minnesota and the trading that took place in these accounts occurred through a Minnesota brokerage" on a United States market. *Ibid.*

The court then held, on the merits, that Zahareas was an "associated person" of Tuschner & Co. because he had "served as an agent of Tuschner & Co. by orchestrating Tuschner & Co.'s trading in the Greek accounts." Pet. App. 21a. The court explained that Zahareas had referred Greek customers to Tuschner & Co., completed all information to open accounts for them at the firm, directed trading in the accounts, received reports on the accounts, "and served as the only means through which Tuschner & Co. had contact with its Greek customers." *Id.* at 21a-22a. The court further found that there was "no evidence of a relationship between these customers and Euroamerican." *Id.*

at 22a. In sum, the court concluded, Zahareas's activities "were similar to those of a Tuschner & Co. broker at a remote location." *Ibid.* The court thus entered preliminary injunctions against the defendants. *Id.* at 22a-26a.

b. The court of appeals affirmed "for the reasons set forth in the district court's opinion." Pet. App. 3a. Judge Morris Arnold dissented on the ground that the facts found by the Commission "were not inconsistent with two separate companies doing business with each other," and that the Commission had therefore "failed to establish that Mr. Zahareas was under Tuschner & Co.'s control." *Id.* at 3a-5a.

ARGUMENT

1. a. Petitioner contends that, in upholding the district court's exercise of subject-matter jurisdiction, the court of appeals has created a "conflict" (Pet. 7) with the law of other circuits on the jurisdictional reach of the securities laws. That is incorrect. As an initial matter, the Eighth Circuit's per curiam decision, which summarily affirmed an unpublished district court order, is of limited precedential significance. In any event, the result below is entirely consistent with the decisions of other courts of appeals.

In determining whether to apply the federal securities laws to transactions with a foreign entity, the courts have generally applied a pair of alternative tests: the "conduct" test and the "effects" test. See *Continental Grain (Australia) Pty. Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 417, 420 (8th Cir. 1979). Under the conduct test, a court considers whether "there has been significant conduct with respect to * * * alleged violations in the United States." *Travis* v. *Anthes Imperial Ltd.*, 473 F.2d 515, 524 (8th Cir. 1973); see also

Continental Grain, 592 F.2d at 419-420.[2] That test is easily met in this case. Although Zahareas resided in Greece and made trades for Greek residents, he did so by impermissibly associating with a United States brokerage firm and by using his position with that firm to effect transactions in securities of a United States company on a United States market.

Petitioners argue that, in the course of making that determination, the district court erroneously formulated the inquiry as whether "*some* activity involving a violation of the Exchange Act occurred in this country" (Pet. 9 (quoting Pet. App. 14a) (emphasis added)), and they conclude that, in so doing, the court "abandoned the anchors which have previously grounded extra-territoriality jurisprudence" (Pet. 10). That is not so. To begin with, the district court's formulation of the standard was immaterial to the result it reached, because in fact the bulk of the events at issue occurred

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[2] As petitioners note (Pet. 8 n.5), many courts of appeals—including the Eighth Circuit—apply some variant of this conduct test. Although the test has been articulated in different ways, see generally *Kauthar SDB BHD* v. *Sternberg*, 149 F.3d 659, 663-667 (7th Cir. 1998), cert. denied, 119 S. Ct. 890 (1999), those differences are not relevant here, and petitioners do not contend otherwise. As an initial matter, the differences in formulating the test have typically arisen in the context of private suits for damages; as discussed on p. 9 below, such suits raise quite different jurisdictional questions from those presented by suits brought by the Commission to enforce prophylactic remedies such as bar orders. In any event, the facts of this case would satisfy the principles underlying even the most stringent form of the conduct test, under which the conduct in this country must constitute the elements of the alleged violation. See, *e.g.*, *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 30-33 (D.C. Cir. 1987). Here, the relevant conduct in this country constituted an impermissible association between Zahareas and Tuschner & Co.

in this country. In any event, the district court made clear in the same passage that it was adhering to the Eighth Circuit's prior decisions in *Continental Grain* and *Travis* (see Pet. App. 14a-15a), and petitioners themselves cite *Continental Grain*, with evident approval, as an example of an application of the "conduct" test (see Pet. 8 n.5). The Eighth Circuit's summary affirmance cannot plausibly be construed as a repudiation of that existing precedent.

Petitioners also attribute apparent significance (Pet. 8) to the proposition, contained in several judicial opinions, that the "conduct" test requires proof that the conduct in the United States was causally related to "the resultant harm to foreign investors." That proposition, however, is irrelevant to the question presented here. The cases that petitioners cite involved private claims for damages; in that context, it is pertinent to examine the relationship between the conduct and the resulting harm. In this case, by contrast, the Commission seeks to enforce a prophylactic remedy against an individual deemed unfit to act as a securities professional in this country. When the Commission seeks to enforce such a remedy, it need demonstrate only a potential for harm; it need not wait until harm has actually occurred. See, *e.g.*, *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963); *SEC* v. *Rana Research, Inc.*, 8 F.3d 1358, 1363 n.4 (9th Cir. 1993); *SEC* v. *Blavin*, 760 F.2d 706, 711 (6th Cir. 1985).

Petitioners also liken this case to one involving the registration or filing provisions of the securities laws, and they argue that such cases present more stringent jurisdictional requirements than do fraud cases. Pet. 9. But that argument rests on a mischaracterization of this case. Although the Commission has not alleged that Zahareas committed fraud in the transactions at

issue, neither is it simply seeking to enforce a regulatory measure such as securities registration. Again, the purpose of this action is to enforce a 1993 bar order issued after the Commission determined that Zahareas had engaged in fraudulent conduct. The Commission determined in that order that Zahareas poses so substantial a risk to investors that he should be barred from the United States securities business. A court may appropriately exercise jurisdiction to enforce that order, even if the potential victims of any wrongdoing might be foreign investors using United States securities markets, for Congress did not want the United States "to become a base for fraudulent activity harming foreign investors." *Europe and Overseas Commodity Traders, S.A.* v. *Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998), cert. denied, 119 S. Ct. 1029 (1999); see also *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 32-33 (D.C. Cir. 1987); *SEC* v. *Kasser*, 548 F.2d 109, 116 (3d Cir.), cert. denied, 431 U.S. 938 (1977); *Continental Grain*, 592 F.2d at 421- 422.

b. Petitioners devote much of their argument to a variety of statutory and regulatory provisions that neither of the courts below discussed. See Pet. 11-21. As an initial matter, this Court does not ordinarily grant certiorari to consider issues that no lower court has expressly examined. In any event, the provisions on which petitioners rely do not support their position here.

First, petitioners can derive no support from Section 30(b) of the Exchange Act, 15 U.S.C. 78dd(b), which excludes from the Act's coverage a person who "transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate

to prevent the evasion of this [title]." Section 30(b) does not, as petitioners argue, exempt someone from the coverage of the federal securities laws merely because he operates from outside the territorial limits of the United States. See, *e.g.*, *SEC* v. *United Fin. Group, Inc.*, 474 F.2d 354, 357-358 (9th Cir. 1973); *Arthur Lipper Corp.*, 46 S.E.C. 78, 91 (1975); see also *Travis*, 473 F.2d at 526 n.21.[3] One who resides outside the United States, but who associates with a firm in the United States, and who otherwise engages in significant securities conduct in the United States, does not fall "without the jurisdiction of the United States." See *Roth* v. *Fund of Funds, Ltd.*, 405 F.2d 421, 422 (2d Cir. 1968), cert. denied, 394 U.S. 975 (1969). As the scant authority cited by petitioners suggests (Pet. 14), Section 30(b) has been applied rarely and only where the transactions at issue, while involving some contacts with the United States, were in all significant respects foreign. See *Kook* v. *Crang*, 182 F. Supp. 388, 390 (S.D.N.Y. 1960) ("All the essentials of these transactions occurred without the United States."); *Sinva, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 F.R.D. 385, 386 (S.D.N.Y. 1969) ("There was not the slightest evidence that any of the commodity futures

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[3] Petitioners argue (Pet. 13) that Section 30(b) was intended to codify the rule, articulated in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), that, unless Congress indicates a contrary intent, its laws are to be applied only within the territorial jurisdiction of the United States. But that argument misses the central point: The conduct at issue here occurred largely, albeit not entirely, in the United States. Moreover, when Congress defined "interstate commerce" in the Exchange Act, it expressly included "trade, commerce, transportation, or communication * * * between any foreign country and any State." 15 U.S.C. 78c(a)(17).

transactions in issue were executed on any exchange in the United States.").

There is also no merit to petitioners' claim that their conduct is exempt from regulation on the theory that it falls within the scope of the SEC's Rule 15a-6(a)(4)(i), 17 C.F.R. 240.15a-6(a)(4)(i), which exempts from broker-dealer registration "[a] foreign broker or dealer" who, *inter alia*, "[e]ffects transactions in securities with * * * [a] registered broker or dealer, whether the registered broker or dealer is acting as principal for its own account or as agent for others." First, that rule applies only to a person who is a "foreign broker or dealer," and that term is expressly defined, in Rule 15a-6(b)(3), 17 C.F.R. 240.15a-6(b)(3), to exclude any "natural person associated with[] a registered broker or dealer." See also *Registration Requirements for Foreign Broker-Dealers*, Exchange Act Rel. No. 27017 (July 11, 1989), 43 S.E.C. Docket 2471, 2478 (July 25, 1989) (July 1989 Release). Here, as the courts below found, Zahareas was an associated person of a registered broker-dealer, and he therefore did not fall within the relevant statutory definition.

Moreover, even if Rule 15a-6 were somehow applicable to the conduct here, the rule provides an exemption only from broker-dealer registration. Although petitioners repeatedly conflate "registration" with "regulation" (Pet. 15-21), Rule 15a-6, like the related authorities cited by petitioners, does not provide a blanket exemption from all securities regulation. As the Commission noted in its release adopting the rule, many provisions of the federal securities laws, and many of the Commission's regulations, apply on their face to

unregistered broker-dealers.[4] Although the Commission added that as a matter of policy its staff would not recommend that the Commission take enforcement action against foreign broker-dealers for want of compliance with" many of those provisions, the Commission reaffirmed that such broker-dealers *would* remain subject to Sections 15(b)(4) and 15(b)(6) of the Act, 15 U.S.C. 78*o*(b)(4) and 78*o*(b)(6). July 1989 Release, 43 S.E.C. Docket at 2473 n.22. It is Section 15(b)(6)(B) that petitioners are charged with violating here.

2. Finally, petitioners claim (Pet. 22-29) that the courts below erred in finding that Zahareas was an associated person of Tuschner & Co. That claim is fact-bound and wrong, and it warrants no further review.

Section 3(a)(18) of the Exchange Act, 15 U.S.C. 78c(a)(18), defines "person associated with a broker or dealer" and "associated person of a broker or dealer" to include "any person directly or indirectly * * * controlled by * * * such broker or dealer, or any employee of such broker or dealer." Section 3(a)(18) is construed broadly "so as to prevent evasion of the Act's proscription against broker-dealers engaging in the securities business with associated persons subject to statutory disqualification." *Van Alstyne, Noel & Co.*, 43 S.E.C. 1080, 1087 (1969).[5]

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[4] See July 1989 Release, 43 S.E.C. Docket at 2473 n.22 (Tuschner C.A. App. 49) (citing Sections 15(b)(4) and 15(b)(6) of the Exchange Act, 15 U.S.C. 78*o*(b)(4) and 78*o*(b)(6), and Rules 15c3-1 (net capital requirements), 15c3-3 (customer protection—reserves and custody of securities), 17a-3 (records), 17a-4 (records maintenance), 17a-5 (reports); 17 C.F.R. 240.15c3-1, 15c3-3, 17a-3, 17a-4, 17a-5 (1997)).

[5] An associated person need not be an "employee" of the firm, although Zahareas fell within the scope of that term as well. As used in Section 3(a)(18), the term "employee" is construed with

The district court properly concluded that Zahareas associated with Tuschner & Co. as its agent, performing the usual and customary functions of a Tuschner & Co. representative at a remote location. Pet. App. 21a-23a. He solicited customers for the firm, principally recommended to them securities in which Tuschner was making a market, opened accounts for them at Tuschner, directly gave orders to Tuschner's trading department, and monitored the customer accounts at Tuschner. See SEC C.A. Br. 9-13, 40-41; see also pp. 2-5, *supra*.[6]

Despite petitioners' claims to the contrary, this case is readily distinguishable from an ordinary correspondent (or "introducing-clearing") relationship between a domestic brokerage firm and a truly independent foreign broker-dealer. First, when asked during the

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unusual breadth; for example, in this context, though not in many others, an independent contractor can be deemed an "employee." See, *e.g.*, *William V. Giordano*, Exchange Act Rel. No. 36742 (Jan. 19, 1996), 61 S.E.C. Docket 453, 458 (Feb. 20, 1996); Letter from Commission's Division of Market Regulation to Gordon S. Macklin, President of NASD, [1982-1983] Fed. Sec. L. Rep. (CCH) ¶ 77,303, at 78,117 (June 18, 1982). This case does not squarely present any issue concerning Zahareas's "employee" status, because he qualifies as an "associated person" on the independent ground that his conduct was controlled by Tuschner & Co.

[6] The dissent below (Pet. App. 5a) viewed the district court's finding that Zahareas was acting as an agent for Tuschner & Co. as inconsistent with that court's statement (*id.* at 22a) that "Zahareas exerted control over Tuschner & Co. with regard to the handling of the Greek accounts." But the district court obviously did not mean that Tuschner & Co. was somehow working for Zahareas. Read in context, the court's reference to control meant only that, as is common with agents, Zahareas was entrusted to exercise considerable authority on behalf of his principal. Of course, Tuschner & Co., which subjected the transactions to its own compliance oversight, retained ultimate control over the transactions and over whether Zahareas would continue as its agent.

Commission's investigation, Tuschner officials affirmed that this was not a correspondent relationship and that Euroamerican was not acting as a correspondent broker. See SEC C.A. Br. 42. When asked specifically whether Euroamerican was acting as an introducing broker, Tuschner & Co.'s compliance officer answered "no." *Ibid.* (citing SEC C.A. App. 136-137). Indeed, when asked whether "the idea of making Euroamerican a corresponding broker" had been discussed among the persons at Tuschner & Co. who were deciding how to treat the relationship with Zahareas, the compliance officer answered "I don't believe so." *Ibid.* (citing SEC C.A. App. 77).

Moreover, when an independent foreign broker-dealer introduces its clients to an American firm, it ordinarily has a substantial business apart from its relation with the American firm, and its relation with that firm is merely one part of its securities business.[7] The evidence here, however, indicates that Euroamerican was created for the purpose of locating Greek customers for Tuschner and handling their Tuschner accounts. The district court found (Pet. App. 22a) that there was no record evidence that these Greek customers had any relationship with Euroamerican apart from the work done for Tuschner.

In addition, Zahareas was compensated in exactly the same fashion as any other Tuschner & Co. representa-

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[7] Such a relationship describes the circumstances underlying the Bear Stearns no-action letter, which petitioners erroneously characterize as "mirror[ing] the facts of this case in all essential respects." Pet. 20-21 n.23 (discussing adoption of Rule 15a-6 and the positions taken by the Commission's staff in Letter from an Associate Director of the Commission's Division of Market Regulation to the Director of Legal and Compliance Department of Bear, Stearns & Co. (Jan. 7, 1976)).

tive, he was dunned for trading losses in the same way, and he was subject to the same oversight by Tuschner's compliance director to which other representatives were subjected. See pp. 3-5, *supra*. Finally, when Tuschner, in the wake of the Commission's investigation, decided it could no longer use Zahareas, it ostensibly got rid of him but retained the customers. See Pet. App. 12a-13a. If, in fact, Zahareas were not working for Tuschner, the firm, after allegedly severing its relation with Zahareas, would not have asserted control of the accounts, accepted new accounts, and traded in accounts of customers Zahareas had solicited. In sum, the facts in the record amply support the district court's finding that Zahareas was an "associated person" of Tuschner & Co., and petitioners' contrary contention warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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